

2004 AUG 13 P 3 23

August 13, 2004

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Comments
AOR 2004-31

Re: Comments on Advisory Opinion Request 2003-31

Dear Mr. Norton:

These comments are filed on behalf of Democracy 21, the Campaign Legal Center and the Center for Responsive Politics in regard to AOR 2004-31, an advisory opinion request submitted on behalf of Russ Darrow Group, Inc. (hereafter, "RDG").

The request seeks permission for RDG, a Wisconsin corporation which primarily sells and offers vehicle repair and maintenance services on new and used automobiles, to use its general treasury funds to air broadcast advertisements about the business. RDG uses its corporate name - which includes the name "Russ Darrow" - in its advertisements.

RDG states that its CEO and Chairman of the Board, Russ Darrow, Jr., is presently a candidate for the United States Senate. Ltr. of July 21, 2004 at 1. The Wisconsin primary election is scheduled for September 14, 2004, and the general election is on November 2, 2004. Russ Darrow III, the candidate's son, is RDG's president and chief operating officer, and is primarily responsible for the day-to-day operation of the company, including its plans and business activities. *Id.*

The request states that the use of the name "Russ Darrow" is only in the context of the name of the company. *Id.* at 2. Russ Darrow, Jr., the candidate does not appear in the ads and was not involved in any way in the advertising plans or decisions of the company. *Id.* at 3. Russ Darrow III does appear in the ads, as has been the company's normal practice for at least ten years. *Id.* The request also states that the ads contain no reference to the campaign of Russ Darrow, Jr., or to any issues in the campaign. *Id.* at 2. And the request states that the proposed ads are being run in the normal course of the company's business, and that the nature, content, timing and frequency of the ads are all within historical company business practices. *Id.* at 5, 13.

Electioneering communications are broadcast ads that refer to a "clearly identified candidate for Federal office," and that are broadcast to the electorate of the candidate in a period 30 days before a primary election, or 60 days before the general election. 2 U.S.C. § 434(f)(3)(A). Corporate treasury funds may not be used to pay for electioneering communications. 2 U.S.C. § 441b(c).

RDG seeks an advisory opinion as to whether it can use its corporate treasury funds to pay for broadcast ads that include the name "Russ Darrow" and that will be broadcast within the pre-primary and pre-general election windows, without violating the rules pertaining to electioneering communications.

We submit that the Commission should resolve this request on the basis of its unique factual circumstances. The ad scripts attached to the AOR show that most uses of the name "Russ Darrow" is in the context of stating the company's name: "Russ Darrow Cadillac," "Russ Darrow Kia," "Russ Darrow Toyota," etc. Thus, the use of the name "Russ Darrow" here is a reference to a business, and thus, by definition, not to a "clearly identified candidate." Accordingly, this use of the name does not trigger the electioneering communications provisions of the law, since the proposed business ads would not be a broadcast that "refers to a clearly identified candidate for Federal office." 11 C.F.R. § 100.29(a)(1).

In the few instances where the name "Russ Darrow" is stated in the ads in reference to an individual,¹ it is clearly in regard to Russ Darrow III, who appears in the ads as the current president of the company and as the person with day to day responsibility for managing the company. This use of the name also would not trigger the provisions of the law since it is not a reference to a "clearly identified candidate," but to a different individual.

The facts of the request, viewed in context, support this result. Unlike past situations where a candidate's name was part of a business name but where there was strong evidence that the business ads were being used to promote the campaign,² there is no evidence here that the advertising for the auto dealership is being used to promote the Darrow candidacy.

Significantly, the company spokesman who appears in the ads, Russ Darrow III, has played this role as the public "face" of the company in its advertisements for over a decade, according to the AOR letter. Russ Darrow Jr., the candidate, does not appear in the ads at all nor is he specifically referenced or pictured. As the AOR letter represents, the company is continuing to run its ads in the normal course of business, and is not changing the content or nature of the ads, or increasing the frequency of its ads, in order to benefit the campaign. Nor is there any other indication that the content of the ads is

¹ *E.g.*, the script of one of the ads includes "Hi, I'm Russ Darrow inviting you to visit Russ Darrow Cadillac in Waukeesa." This is spoken by Russ Darrow III.

² See MUR 3918 (Hyatt Legal Services).

designed to benefit the Darrow campaign – for instance, by discussing a political issue or by the nature of the slogan used.

A different fact situation – for instance, where the candidate himself appears in the ads, where the nature of the company ads change at the time of the political campaign, or where there is evidence that the business ads refer to the campaign or issues in the campaign, or are in any way coordinated with the campaign – would yield a different result.

But on the facts presented by the request here, particularly where the name at issue can reasonably be considered a reference to the company, not to the candidate, we believe the Commission – on these specific facts – should construe the ads as not containing a reference to a “clearly identified” candidate, and thus not constituting electioneering communications.

We appreciate the opportunity to provide these comments to you.

Sincerely,



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